Supreme Court, U.S.
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No. 95-294

IN THE
# Supreme Court of the United States
OCTOBER TERM, :995

COUNTY OF KERN and CARL SPARKS, Sheriff,
*Petitioners,*
*vs.*
JERRY ANDERSON, GLENNA BLAIR,
TERRY DAVIS, JOHN WARDWELL,
JESSE VASQUEZ, and IRENE JUAREZ,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Do jail conditions violate the Fourteenth Amendment absent a finding that correctional officials acted with a deliberately indifferent state of mind?

2. Must the Circuit Court review findings which create attorney fee liability in the absence of an enforceable order?

3. Can the Circuit Court award catalyst fees for a jail procedure change without determining if the challenged procedure was unconstitutional?

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No. _____

**In The**
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## PETITION FOR WRIT OF CERTIORARI

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Petitioners[1] hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals is reported at 45 F.3d 1310 (9th Cir.1995). (Appendix A.) The decision was amended by addition of footnote in the denial of respondents' motion for rehearing filed July 7, 1995. (Appendix B.)

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[1] All parties are listed in the caption to this Petition.

## JURISDICTION

The final judgment of the court of appeals was entered January 13, 1995. Petitioners' motion for rehearing was denied on May 19, 1995. (Appendix C.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983 (Appendix F).
2. 42 U.S.C. § 1988 (Appendix F).

## STATEMENT OF THE CASE

Petitioners, the County of Kern and Sheriff Carl Sparks, operate a short-term county jail facility which houses pretrial detainees and sentenced county prisoners. Inmates brought a class action under 42 U.S.C. § 1988, alleging approximately forty unconstitutional jail conditions. Some issues were resolved by motion or stipulated settlement. The remainder of the case was tried by a magistrate judge who issued findings and recommendations. (Appendix D.) The District Court adopted the findings of the magistrate judge (Appendix E), and both parties appealed. This petition for writ follows only as to the decision of the Ninth Circuit Court of Appeals, Section III, Non-Inmate Translators for Medical Interviews, and Section IV, Dental and Vision Care.

**Non-Inmate Translators for Medical Interviews.** The decision below relied upon a Seventh Circuit ruling that failure to provide translators for medical interviews could constitute deliberate indifference to a serious medical need in violation of the Eighth Amendment. However, there was no finding by the district court that

the County actually failed to provide a translator. The jail's written policy specified that medical staff or correctional staff would translate and the only factual finding was that inmate translators were sometimes used.[2] The Court of Appeals found that inmate translation was inappropriate and potentially inaccurate, but it upheld the District Court's order that inmates may translate for each other unless they request a staff translator. There was no finding made by either the District Court or the Court of Appeals as to whether the occasional use of inmate translators was an Eighth or Fourteenth Amendment violation, and no finding regarding the state of mind of the correctional officials who established this procedure.

**Dental and Vision Care.** The District Court adopted the magistrate judge's findings regarding the provision of dental and vision care. The magistrate judge expressly found that the level of vision care services offered inmates was unconstitutional, [3] and implied that the previous level of dental care was unconstitutional.[4] Again, there was no finding as to whether there was an Eighth or Fourteenth Amendment violation, and there was no finding regarding the state of mind of the correctional officials.

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[2] Appendix D, "Findings and Recommendations," p. 48. ". . . if an inmate presented at sick call and could not speak English, she would either have a custodial officer or nurse translate, if possible, or would have the officer bring a bilingual inmate to translate. In some cases, she testified, the inmate would choose his own inmate translator; the clear implication was that, in the remaining instances, the inmate translator was chosen for the inmate seeking medical care. RT 4/9/91: 71 at 22-25, 72."

[3] Appendix D, "Findings and Recommendations," page 21, lns. 12-14.

[4] Appendix D, "Findings and Recommendations," page 16.

The District Court did not issue orders as to dental or vision care services, as it found that during the course of the proceedings the County had increased the level of services to constitutionally adequate standards. The County appealed the findings and recommendations of the magistrate judge as adopted by the District Court because they were the basis for an award of attorney fees as a "catalyst" for change under 42 U.S.C. § 1988.

The Ninth Circuit held that the County has no standing to raise the issue because the District Court did not grant injunctive relief. The Ninth Circuit further advised that the matter should be considered by the District Court in the ancillary proceedings regarding attorney fees.

## REASONS FOR GRANTING THE WRIT

**1. A significant and recurring issue is raised as to whether the "deliberate indifference" standard is different for Eighth and Fourteenth Amendment claims brought by incarcerated inmates. There are conflicts within the Courts of Appeals, and the issue is ripe for review.**

The Ninth Circuit's ruling concerning provisions for translators in the Kern County Jail found deliberate indifference without requiring a state of mind inquiry. This analysis conflicts with the holdings of the other Circuit Courts and is in conflict with previous decisions of this court.

Attacks upon conditions of confinement, including the adequacy of food, shelter, safety, and medical care are regularly brought in individual and class action jail litigation. The requirement of an objective analysis of

conditions of confinement in a jail as part of a Fourteenth Amendment claim was first established by the Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). Conditions or restrictions must amount to arbitrary or purposeless punishment, which presumably requires at least a deliberately indifferent state of mind. *Bell v, Wolfish*, 441 U.S. 520, 538-539. More than mere negligence is specifically required to invoke the protection of the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

Subsequently, this Court has held that prisoners who challenge conditions of confinement under the Eighth Amendment must demonstrate both an objective deprivation so serious as to rise to the level of a constitutional violation and a subjective "deliberately indifferent" state of mind. *Wilson v. Seiter*, 501 U.S. 294 (1991), *Farmer v. Brennan*, ___U.S.___, 114 S.Ct. 1970 (1994). This Court has not directly addressed the issue of whether a state of mind finding of at least deliberate indifference is required to prove an unconstitutional condition of confinement under the Fourteenth Amendment.

Throughout the circuits, numerous decisions after *Wilson v. Seiter*, 501 U.S. 294 (1991) have applied a state of mind requirement to Fourteenth Amendment challenges. *Manarite v. City of Springfield*, 957 F.2d 953, 955-956 (1st Cir. 1992); *Kost v. Kozakiewicz*, 1 F.3d 176, 187-188 (3rd Cir. 1993); *Alberti v. Sheriff of Harris County, Tex.*, 937 F.2d 984, 998-1000 (5th Cir. 1991); *Barber v. City of Salem, Ohio*, 953 F.2d 232, 238 (6th Cir. 1992); *Pacelli v. deVito*, 972 F.2d 871, 875-876 (7th Cir. 1992); *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Rubeck v. Sheriff of Wabash County*, 824 F.Supp 1291, 1296 (N.D. Ind. 1993). The failure of the Ninth Circuit to require findings that jail officials acted with a deliberately indifferent state of mind in the occasional use of inmate translators is in conflict with

these decisions and raises a significant question that is ripe for review.

**2. A significant and recurring issue is raised as to County's due process right to challenge findings which create "catalyst" attorney fees.**

The magistrate judge's findings regarding dental and vision care cited above created the basis for a "catalyst" fee claim. The right of appeal turns on whether there is some threatened or actual injury that is both real and immediate. *O'Shea v. Littleton*, 414 U.S. 488, 495-498 (1974). In 1983 actions, a claim for attorney fees under 42 U.S.C. § 1988 meets this qualification. Plaintiffs were in fact awarded fees as catalyst for dental and vision care changes.

The Ninth Circuit's reliance on *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 633 (9th Cir. 1992) is incorrect and in variance with *O'Shea*. Unlike *Native Village of Tyonek*, the court in *Anderson* granted injunctive relief and issued findings and recommendations which became the basis of an attorney fee award. If the County of Kern cannot appeal the correctness of those underlying findings, then petitioner is left without legal recourse to challenge the basis for an award of fees.

**3. The Circuit Court's refusal to Review the District Court's dental and vision care findings conflicts with *Farrar v. Hobby*.**

The County requested that the Ninth Circuit review the District Court's findings concerning the dental and vision care provided to inmates. The County contended

that at all stages of this litigation, the level of care provided met constitutional standards. The decision below declined to review those findings, holding instead that such a review is applicable only during ancillary attorney fee proceedings. However, in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), this court stated that "A request for attorney's fees should not result in a second major litigation." The substantive issues, including the correctness of findings, must be resolved as part of the substantive case, and not simply deferred to the ancillary attorney fees hearing.

Further, the Ninth Circuit standard for ancillary attorney fee proceedings is that the party moving for fees does not need to establish that any unconstitutional problem ever existed, only that its original claim was not "frivolous, unreasonable or groundless." *Rock Creek Ltd. Partnership v. State Water Resources Control Board*, 972 F.2d 274 (9th Cir. 1992).

Underlying the catalyst theory is the basic assumption that the challenged conduct or condition has changed from unconstitutional to constitutional. Otherwise, governmental entities are unable to implement administrative changes to jail conditions during the course of litigation without being liable for attorney fees. A claim that the level of vision care offered to county jail inmates is unconstitutional may very well not be "frivolous," yet not rise to the level of a constitutional violation. A finding that the previous condition is unconstitutional must be made, and it must be appealable under the same standards that apply to any finding that a condition of confinement is unconstitutional.

The decision below and the two Ninth Circuit cases cited conflict with *Farrar v. Hobby*, __ U.S. __, 113 S.Ct. 566 (1992) which requires a change in the legal relationship between the parties before an award of attorney fees is appropriate. The decision below also

conflicts with the post *Farrar* decision of the Fourth Circuit, *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August 16, 1995.

Respectfully submitted,

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